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No. _____

IN THE

Supreme Court of the United States

October Term, 1960

THOMAS E. MOSHEIM, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Thomas E. Mosheim, respectfully petitions for writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit affirming the conviction below for making false oath in a bankruptcy proceeding. The decision of the Court of Appeals is unreported at this time—a copy being attached as Appendix I.

The judgment of the Court of Appeals was entered December 23, 1960, a copy being attached as Appendix II. Petitioner timely filed his petition for rehearing in said court which was denied without opinion January 19, 1961, a copy being attached as Appendix III. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

Questions Presented For Review

1. Does the safeguard of the "two witness" rule, which this Court has applied to prosecutions for perjury in *Weiler v. United States* (1944), 323 U.S. 606, apply to this prosecution for making false oath in a bankruptcy proceeding? Does any fundamental distinction exist between prosecutions for perjury (18 U.S.C. §1621) and for making false oath in a bankruptcy proceeding (18 U.S.C. § 152) which would justify the existence of separate standards by which to measure the sufficiency of the evidence?

2. Are informal records kept by petitioner's secretary and checks bearing petitioner's endorsement typed by her equivalent to records kept by the petitioner in his own hand within the meaning of *United States v. Wood* (1840), 14 Pet. 430? Will such evidence support the conviction of this petitioner where there is no evidence that he saw, handled or recorded any of the checks or monies to which the questions before the Trustee and his answers were directed?

3. Did the joinder of a conspiracy count to the substantive counts, where the overt acts alleged in the conspiracy count were essentially the same acts charged as substantive offenses, deprive this petitioner of "due process of law" under the Fifth Amendment to the Constitution of the United States?

Constitutional Provisions And Statutes Involved

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 152.

* * *

"Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

* * *

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

(See Appendix IV for full text)

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the

punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. § 1621.

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorized an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773.

18 U.S.C. § 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1015. Naturalization, citizenship or alien registry

(a) Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens; or
* * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 752.

Statement of the Case

The petitioner, Thomas E. Mosheim, was called as a witness in a hearing before the Trustee-in-Bankruptcy of Texas Portland Cement Company. At that time he was questioned concerning his relationship to the company as one of its directors, and called upon to identify innumerable checks, letters and documents about which he was then questioned. The charges against the petitioner are based on answers which he gave concerning sums of money paid to Sol Jamail, a co-defendant, by Texas Portland Cement Company. The indictment filed against the petitioner charged him with two counts of "willfully, knowingly, and fraudulently" making a false oath in a bankruptcy proceeding (18 U.S.C. § 152) and one count of conspiring to commit the above offense (18 U.S.C. § 371). The indictment also included one count charging the co-defendant, Sol Jamail, with making a false oath in a bankruptcy proceeding and named Jamail as the conspirator in the conspiracy count. Defendant Jamail appealed from the judgment of the trial court, but is not before this Court on petition for writ of certiorari.

The petitioner had been instrumental in obtaining financing for Texas Portland Cement Company at a time when the Company was in financial distress. Kent B. Diehl, the deposed president of the Company, testified that "the plant never could have been completed without his (Mosheim's) services". As a result of the petitioner's efforts he was elected to the board of directors of the Company—a post which he continued to hold until the summer of 1958 when Diehl plunged the Company into reorganization proceedings at a time when petitioner was attempting to secure additional financial aid. The indictment under which the petitioner is before this Court resulted from

hearings before the Company's Trustee in November of 1958. However, the facts and transaction about which the petitioner was questioned had occurred some six to ten months before the time of the hearing.

Texas Portland Cement Company was newly organized and in need of additional financial backing when petitioner was first approached by the Company's promoters. Petitioner was at that time active in the practice of law in Houston, Texas, and had done some work in the investment field. At the time when the promoters came to petitioner in the latter part of 1956, the cement plant site had been selected and construction was under way. However, the project was stalled because the Company had run short on funds, and the whole operation and stockholders' investment were in jeopardy.

Petitioner secured a short term loan of $600,000 from the Galveston Diocese of the Catholic Church in order to permit the Company to continue construction while arranging for long term financing. This loan was executed January 14, 1957, and was to be payable in three yearly installments of $200,000, plus interest. The first yearly installment became due January 14, 1958, but the Company was unable to meet its obligation. The petitioner, who had been elected a director in the interim, went to the representative of the Church and requested a moratorium on the loan and permission to pay the loan in weekly installments. The petitioner had been reluctant to seek this interview with the representative of the Church, and it was only after considerable urging and argument on the part of Sol Jamail, who shared office space with petitioner, that petitioner agreed to attempt the task requested of him by Diehl.

As a result of the discussions held with the representative of the Church on January 14, 1958, a moratorium was

declared and an arrangement was made for the pledging of invoices to secure the weekly installments which were to be paid in the amount of $2,500. One of the terms of the agreement was that the invoices should be handled through the office of the petitioner and Jamail, since the Church was not equipped to handle the intricate record and bookkeeping required.

The letter quoted by the Court of Appeals in the margin of its opinion from Diehl to Jamail dated March 11, 1958, nearly two months after the above discussions, confirms the existence of an agreement between Diehl and Jamail under which Jamail was to receive $10,000 per year for his part in convincing the petitioner that he should go to see the Church representative, and for Jamail's services in keeping the records of the invoice transaction. The sole testimony in the record which links the petitioner with any knowledge of this transaction is that of Diehl—a man who had managed the Company into financial trouble before he scuttled it—a man whose testimony, by the Government's own admission, was inaccurate and without support on one of the very facets of the case which the Court of Appeals felt was damaging to this petitioner.

As a result of the agreement between Jamail and Diehl outlined above Texas Portland Cement Company issued its check 1041, dated April 3, 1958, payable to Jamail's order in the amount of $833.33. This check was apparently one-twelfth of the yearly fee of $10,000. On the same day that the Company's check was deposited to Jamail's account, he drew his personal check for $416.66, payable to the petitioner, which check was deposited in the petitioner's bank account with *only* a typed endorsement. The evidence establishes conclusively that the petitioner neither saw nor handled the check in question.

Miss Julia Bradley, who acted as secretary for Jamail and the petitioner, typed the endorsement on the check and credited the amount to the petitioner as income. Several months later she presented her bookkeeping records to the petitioner and he questioned her action in crediting his account, informing her that should credit the amount to Jamail's share of the office expenses.

The matter was next brought to petitioner's attention during his questioning by the attorneys for the Trustee during the hearing. He was unable to identify the checks when they were shown to him—and the trial court found him "not guilty" on this count. However, the trial court to whom the case was tried without a jury found the petitioner "guilty" under the second and fourth counts (R. 512), and appeal was duly perfected to this Court.

The court of first instance, the United States District Court for the Southern District of Texas, Houston Division, had jurisdiction under 18 U.S.C. § 3231, because each of the counts of this indictment alleged an offense against the laws of the United States.

Reasons for the Allowance of the Writ

The rule applicable to perjury prosecutions in the federal courts is that the uncorroborated testimony of one witness is insufficient to establish the falsity of the statement under oath. *Hammer v. United States* (1926), 271 U.S. 620, 70 L. Ed. 1118; *Weiler v. United States* (1944), 323 U.S. 606, 89 L. Ed. 495. The question before this Court is whether the so-called "two witness" rule is applicable to prosecutions for making false oath in a bankruptcy proceeding. The question has been raised before this Court in both the *Hammer* case and in *Gold v. United States* (1957), 352 U.S. 985, 1 L. Ed. 2d 360, but has not

been decided as of this time. In the *Hammer* case it was held that the indictment was sufficiently broad to encompass either perjury or making a false oath in a bankruptcy proceeding, and the Court applied the "two witness" rule. Justice Clark dissented in the *Gold* case on the ground that the Court should have considered the applicability of the "two witness" rule to a prosecution for making a false statement, but the case was reversed on other grounds. Thus, the Court is confronted with an important question of federal law which has not been, but should be, settled by the Court.

The need for a decision on this point is compelling, because the Courts of Appeal for the Fifth and Seventh Circuits have rendered conflicting decisions with regard to the applicability of the "two witness" rule. The petitioner submits that this uncertainty in the law is a substantial one leading to uncertainty in the trial courts as to the degree of proof required in prosecutions under false statement and false oath statutes. Such uncertainty exists in this case, since the Government, the trial court and the appellate court below differ as to which testimony and evidence supports and corroborates which testimony. The Government has repeatedly pointed to Diehl, the deposed president of the Company, as the principal witness whose testimony found support in the mass of documentary evidence, whether admissible or inadmissible. This is the witness of whom the trial judge said, " . . . there are certain portions of his testimony in which I am not prepared to place much credence . . ." (R. 5) — the witness of whom the District Attorney himself said, " . . . there is a part of his testimony which the Government believes to be inaccurate . . . " (R. 291). The Court of Appeals cited the testimony of the petitioner's secretary as the primary evi-

dence which was corroborated by the mass of documents and the testimony of Diehl. Thus, the courts below and the prosecution are unable to agree on what evidence supports the conviction. The petitioner submits that this confusion is due in part to the unsettled state of the law.

The conflict in the Courts of Appeals exists because of the following cases:

Fifth Circuit

Cuesta v. United States (1956), 230 F. 2d 704;

Seventh Circuit

Goetz v. United States (1932), 59 F. 2d 511;
United States v. Lynch (1950), 180 F. 2d 696;
United States v. Marachowski (1953), 201 F. 2d 5.

The Fifth Circuit has applied the "two witness" rule to both perjury prosecutions and prosecutions under the various false swearing statutes. The charge in the *Cuesta* case was making a false statement under oath in a naturalization proceeding in violation of 18 U.S.C. §1015. This is one of a group of statutes, including the one under which this petitioner was charged, in which it is made an offense to swear falsely or make a false oath in a specific type of proceeding.[1] The Fifth Circuit applied the general rule applicable to perjury prosecutions to the *Cuesta* case and reversed the judgment of conviction below. The effect of this holding is to apply the "two witness" rule to prosecutions such as that against this petitioner. The petitioner urges that the holding of the Fifth Circuit in the *Cuesta*

[1] It is apparent from comparing these statutes with the perjury statute that the offense is of at least equal gravity with that of perjury, since in each instance the maximum fine is greater than that for perjury while the maximum time of imprisonment is the same. See pp. 4-5.

case is in conflict with the cases decided in the Seventh Circuit where the court has indicated that the "two witness" rule is not applicable to such proceedings. Although the petitioner believes that the decisions in *Goetz*, *Lynch* and *Marachowski* are not in point with regard to the facts before this Court, the statements of abstract legal principle which they contain have been cited to the courts below by the Government with the net result being the confusion as to which evidence supports the judgment.

The cases from the Seventh Circuit are based on the premise that the "two witness" rule has lost some of its force in perjury prosecutions. This position is best illustrated by the language used in *United States v. Marachowski*, 201 F. 2d 5. However, that position was urged before this Court in *Weiler v. United States* (1944), 323 U.S. 606, 89 L. Ed. 495, where the Court held forcefully that the failure of the trial court to charge the jury properly on the "two witness" rule required the reversal of the conviction below. This Court reconsidered its position on the "two witness" rule at that time and decided that the absence of legislation in derogation of the rule "indicates that it is sound and has been found satisfactory in practice."

The petitioner submits that the "two witness" rule retains its validity in prosecutions for perjury under 18 U.S.C. §1621, and that it is applicable to prosecutions under the various false swearing and false oath statutes, including 18 U.S.C. §152 under which the petitioner is charged. The conflict between the Circuits and the unsettled nature of the law with regard to the degree of proof required by the Government present this Court with a question of utmost importance to this petitioner as well as those who may be similarly situated in the future. Petitioner respectfully submits that an answer is required in order that confusion be dispelled and justice be done.

The Courts below have placed considerable emphasis on the documents and checks introduced in evidence as corroboration of the oral testimony. The Government has taken the position that, even if the "two witness" rule is applicable, there is sufficient evidence in the record to meet that test. The case cited in support of its position is *United States v. Wood* (1840), 14 Pet. 430, 10 L. Ed. 527, where the defendant was charged with perjury for making a false owner's oath under the customs laws. The evidence before the Court in the *Wood* case was the books and records with the defendant *himself* had kept in the course of his business, and this Court held that such evidence was sufficient to support the conviction. This case has been cited with approval and followed since that time.

The *Wood* case is not applicable to the facts before this Court, because there were no records offered in evidence which were kept by the petitioner *himslf*. The endorsement on the check from Jamail to the petitioner referred to in the opinion of the Court of Appeals was typed by petitioner's secretary and the evidence is uncontradicted that petitioner did not see the check prior to the time when it was shown to him at the hearing before the Trustee. The trial judge found that the petitioner had not lied when he said that he was unable to identify the checks when asked to do so by the Trustee. The records of the running indebtedness between Jamail and the petitioner were kept by their secretary under what must be termed extremely loose supervision. None of the records, documents or checks which are contained in the record before this Court are corroborative evidence within the meaning of the *Wood* case.

The Court of Appeals has affirmed petitioner's conviction on the basis of a letter from the president of Texas Port-

land Cement Company to Jamail, the testimony of petitioner's secretary with regard to records which she kept and a check from Jamail to petitioner bearing a typed endorsement by petitioner's secretary. There is absolutely no evidence that petitioner saw either the letter or the check before the Trustee's hearing and there is only the evidence of Diehl which links petitioner with knowledge of the arrangement. This is the witness whom the Government repudiated, and who certainly was interested in seeing the responsibility for the Company's demise spread as widely as possible.

The conversation between petitioner and his secretary to which the Court of Appeals refers occurred some time before the hearing. At that time petitioner told his secretary to credit the amount to Jamail's share of the office expenses, and this was evidently done. Was this action a receipt of the monies by petitioner's "office overhead" or "legal office" as charged in the indictment (R. 7)? From this slender thread involving the definition of terms hangs a legal career which has extended over more than two decades. The petitioner submits that the evidence before this Court in this case does not meet the test of *United States v. Wood* (supra), and that the evidence in this record is insufficient to sustain the judgments below.

The Government chose to file two substantive counts against this petitioner for making false oath in a bankruptcy proceeding in violation of 18 U.S.C. §152. However, it then added a conspiracy count, alleging as the overt acts essentially the same acts which were charged under the substantive counts. The net result was a lowering of the bars of evidence with extreme prejudice to the petitioner. This tactic and its drastic results are considered and disapproved in the concurring opinion in *Krulewitch v. United States* (1949), 336 U.S. 440, 93 L. Ed. 790.

The transparency of the Government's object was perceived by the Court of Appeals when it discussed the conspiracy count in the last paragraph of its opinion. The conspiracy count added nothing to the indictment, because a conviction was necessary on the substantive counts before there could be a conspiracy conviction. Thus, was the Government able to fill this record with a mass of immaterial, irrelevant and prejudicial evidence which did not bear on the substantive counts, but which was damaging to the petitioner.

The petitioner submits that the conspiracy statute is not a tactical weapon to be used by the Government to lower the bars of evidence, and that this practice deprived this petitioner of "due process of law".

Conclusion

This case presents an opportunity to dispel the confusion surrounding the applicability of the "two witness" rule, and to put to rest a conflict between the Circuits. It also raises the issue of "due process" with regard to the use of a conspiracy count in an indictment where it serves no purpose in the equitable administration of justice. Petitioner respectfully submits that the issues presented by this petition are of compelling importance to not only this petitioner, but to others who may be similarly situated in the future, the bench and bar, and the judicial pattern as a whole.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX I

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 18,216

THOMAS E. MOSHEIM and SOL JAMAIL, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas

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December 23, 1960.)

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

RIVES, Circuit Judge: Upon waiver of a jury trial,[1] the defendants were tried to the court without a jury,

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[1] Rule 23 (a), Federal Rules of Criminal Procedure, 18 U.S.C.A.

and each of them was found guilty of making a false oath in a bankruptcy proceeding[2] and of conspiracy to swear falsely in such proceeding.[3]

The second count of the indictment charged that Mosheim testified falsely before the Trustee in Bankruptcy that neither he, personally, nor any business venture with which he was associated, nor his "office overhead" received any of the money that was paid to Jamail for his services to the Texas Portland Cement Company. The third count charged that Jamail testified falsely before the Trustee to the effect that none of said money was given to Mosheim. The fourth count charged that Mosheim and Jamail entered into a conspiracy to testify falsely before the Trustee.

The questions presented upon appeal, relate to the sufficiency of the evidence to sustain the judgments of conviction. As to the substantive counts, the claims of insufficiency are limited to that part of the evidence relating to the falsity of the oath and the intent required.

2. "§152. **Concealment of assets; false oaths and claims; bribery**

"....

"whoever, knowingly and fraudulently makes a false oath . . . in or in relation to any bankruptcy proceeding . . .

"....

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C.A. § 152.

3 18 U.S.C.A. §371—On the count charging conspiracy, Mosheim was fined $7,500 and given a thirteen-month suspended sentence and Jamail was fined $5,000 and given a nine-month suspended sentence. On the substantive counts, each was given a suspended sentence—Mosheim for thirteen months, Jamail for nine months, the sentences to run concurrently with the sentences imposed on the conspiracy count.

Mosheim had been instrumental in obtaining a $600,000.00 loan to the Texas Portland Cement Company secured by a first mortgage on the Company's plant. The loan was obtained on January 14, 1957, from Bishop Nold of the Galveston Diocese of the Catholic Church. On June 30 of that year, Mosheim was elcted a member of the Board of Directors of the Company. He remained a director until the filing of the petition for the reorganization of the Company. The loan was payable in three annual installments of $200,000.00 each, plus interest at the rate of 7% per annum. When the first principal installment became due on January 14, 1958, the corporation was unable to meet its obligation. The Bishop was persuaded to accept a check for the interest on the loan, $42,000.00, and to grant a moratorium to the Company under an arrangement for the pledging of invoices of the Company to the Bishop in the amount of $2,500.00 per week. The Bishop suggested that the bookkeeping arrangements involved and the collection of the funds for him be handled through Mosheim's office.

Mosheim, an attorney at law, shared his office space and secretarial help with Jamail, an investment broker. Diehl, the President of the Company, testified that he entered into an arrangement with Mosheim and Jamail under which the Company was to pay to Jamail $833.33 per month for Mosheim's and Jamail's services in securing the extension of the loan and in the keeping of records necessitated by the pledging of invoices. That agreement was evidenced by a letter from Diehl

to Jamail copied in the margin.[4] Diehl testified that Mosheim insisted on the payments being made through Jamail, "because he (Mosheim) was a director of the Texas Portland Cement Company, he thought it would be better not to be receiving the payments personally."

The Texas Portland Cement Company issued its check No. 1041, dated April 3, 1958, to the order of Sol Jamail in the amount of $833.33, supported by voucher showing that the check was "payment for services rendered in connection with accounting and managerial services account of the Most Reverend W. J. Nold." There was some indication that the check was post-dated. It was endorsed and deposited to Jamail's bank account on April 3, 1958. On the same day there was deposited to Mosheim's bank account a check dated

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[4] "March 11, 1958

"Mr. Sol Jamail
Pioneer American Building
711 Main Street
Houston, Texas

"Dear Mr. Jamail:

"This letter will confirm our understanding between you and the Texas Portland Cement Company wherein you will be paid $10,000 per year on a monthly basis effective this current month for your successful negotiation with The Most Reverend W. J. Nold wherein the Texas Portland Cement Company is to be permitted to pay out its mortgage on the basis of assigning a minimum of $2500 per week in installments to Mr. Thomas E. Mosheim, Trustee for the Most Reverend W. J. Nold. You will be issued a check monthly on the basis of $10,000 per year as payment to you, not only negotiating the loan but for your service in keeping the records and the payment to The Right Reverend W. J. Nold, in accordance with our agreement.

"Very truly yours,
"TEXAS PORTLAND
CEMENT COMPANY
"Kent B. Diehl, Sr.
President."

KBD:edd

April 2, 1958, signed by Jamail, payable to the order of Mosheim, in the amount of $416.66, which bore on its face the notation, "1/2 fee from Texas Portland Cement Company for services rendered." That check was endorsed by typewriter, "For deposit only to account of T. R. Mosheim," but was not signed or endorsed in person by Mosheim.

Miss Julia M. Bradley, who acted as secretary for both Jamail and Mosheim, testified that she prepared the check to Mosheim upon Jamail's instructions and presented it to Jamail for his signature, but that she did not know whether Mosheim ever saw the check, "because sometimes I would send money to his bank, and as you will see, I used the typewriter and put 'For deposit only'." She further testified that Jamail usually owed Mosheim on the running account for their joint office expenses; that she had entered the $416.66 to the credit of Mosheim on his ledger sheet as inc , that Mosheim sometime later told her that was wrong and to put the full amount to Jamail's credit on his running account for office expenses. She further testified: "Q. Will you state why? A. He said, 'I am a director of that company, and I cannot take this money'." She complied with Mosheim's direction. It is not necessary to detail the more complicated facts and circumstances concerning two other checks referred to in the indictment.

Jamail had testified positively in the bankruptcy proceeding that none of the compensation for services was ever given directly or indirectly to Mosheim. Mosheim had testified that he did not receive from Jamail any portion of the money remitted to Jamail by the Company for these services. He further testified:

"Q. Did the office overhead, that is your legal office, did it receive any portion of the money that was paid to Mr. Jamail by the Texas Portland Cement Company?

"A. No, sir. The source of his funds used in paying his portion of the expenses, in other words, I don't know where he got the money. I am not passing on that, but as far as anything coming out of those proceeds to me or for my benefit or to any corporation or company in which I have a financial interest, no, sir."

The federal courts adhere to the rule that in prosecutions for perjury the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused.[5] In *Hammer v. United States*, *supra* n. 5 (271 U.S. at 626), the Court found it unnecessary to consider whether every false oath in bankruptcy is perjury. And, in *Gold v. United States*, 1957, 352 U.S. 985, 986, the Court, over Mr. Justice Clark's dissent, declined to consider the applicability of the perjury rule of evidence to the False Statement Statute (18 U.S.C.A. §1001). The Seventh Circuit in *United States v. Marachowsky*, 1953, 201 F. 2d 5, 9, pointed out the possible legal difference between the crime of a false oath in bankruptcy proceedings and perjury, but found it not necessary to ground its decision upon any such distinction. Our position on the present appeal permits of a like course.

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[5] Hammer v. United States, 1926, 271 U.S. 620, 626; Weiler v. United States, 1945, 323 U.S. 606, 608; McWhorter v. United States, 5 Cir., 1952, 193 F.2d 982; Cuesta v. United States, 5 Cir., 1956, 230 F.2d 704.

The testimony of Miss Julia Bradley, secretary to Mosheim and Jamail, was to the effect that, when Jamail received the check for $833.33 from Texas Portland Cement Company, he told her to write a check to Mosheim for 1/2 of it, that she did prepare such a check with the notation on the face of it, that Jamail signed the check, and that it was deposited to Mosheim's bank account. True, according to her testimony, Mosheim may then have had no knowledge of his receipt of the $416.66. When he did discover it, however, it appears that he was aware of its source, because he stated to her: "I am a director of that company and I cannot take this money." Instead, however, of returning the money, he simply directed the secretary to change the bookkeeping entries so as to credit it to Jamail's account on his running debt to Mosheim. Miss Bradley's testimony is not unfriendly to her former employers, and is almost conclusively corroborated by the documentary evidence. Further strong corroboration is furnished by the testimony of Mr. Diehl. We conclude, therefore, under the strict rule obtaining in perjury cases, that there was ample evidence as against both Mosheim and Jamail to establish the falsity of the oath and the intent required.

As to the conspiracy count, the rule is well established that participation in a criminal conspiracy need not be proved by direct evidence, but that a common purpose and plan may be inferred from the circumstances.[6] Mosheim and Jamail shared offices and were associates in various business deals. As

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[6] Glasser v. United States, 1941, 315 U.S. 60, 80; Direct Sales Company v. United States, 1943, 319 U.S. 703; Blumenthal v. United States, 1947, 332 U.S. 539; Paoli v. United States, 1956, 352 U.S. 232.

has been seen, both testified falsely that Mosheim did not receive any of the money paid by Texas Portland Cement Company to Jamail. Both also testified that Mosheim had no interest in a separate corporation which discounted the invoices or due bills of Texas Portland Cement Company and made a profit therefrom. Both Jamail and Mosheim had guaranteed in writing the performance of some of the obligations of that corporation. Diehl testified that the principals involved in that corporation were Diehl, Mosheim and Jamail. The name of the corporation was Delmojam. Diehl testified that when the corporation was being formed in the offices of Mosheim and Jamail, "I said it sounded like something to eat, and they said it was a contraction of the names Diehl, Mosheim and Jamail." Both Mosheim and Jamail, however, had a different explanation for the peculiar name. According to Mosheim's testimony before the Trustee in Bankruptcy, it came from "Deliver mor jam. In other words, make some more money." Jamail in his testimony in the bankruptcy proceeding claimed to be the sole stockholder of Delmojam, and, likewise, testified that the name came from the phrase "deliver more jam." There was, we think, ample evidence of the conspiracy and of the participation therein of Jamail and Mosheim. The judgments of conviction are

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit
By Gilbert F. Ganucheau
Deputy

New Orleans, Louisiana Jan. 31, 1961

APPENDIX II

JUDGMENT

Extract from the Minutes of December 23, 1960

THOMAS E. MOSHEIM and SOL JAMAIL,

No. 18216. versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgments of conviction of the said District Court in this cause be, and the same are hereby, affirmed.

* * * * * * * *

APPENDIX III

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

NO. 18,216

THOMAS E. MOSHEIM and SOL JAMAIL, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(JANUARY 19, 1961)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and RIVES and JONES, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above styled and numbered cause is hereby

DENIED.

APPENDIX IV

§152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five year, or both.

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Office-Supreme Court, U.S.
FILED
MAR 21 1961
JAMES R. BROWNING, Clerk

No. 735

In the Supreme Court of the United States

OCTOBER TERM, 1960

THOMAS E. MOSHEIM, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, Jr.
Assistant Attorney General,
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 735

THOMAS E. MOSHEIM, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15–22) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1960 (Pet. 23). A petition for a rehearing was denied on January 19, 1961 (Pet. 24). The petition for a writ of certiorari was filed on February 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to show that petitioner made a false oath in a bankruptcy proceeding, in violation of 18 U.S.C. 152.

2. Whether petitioner was properly convicted of conspiracy.

STATUTES INVOLVED

18 U.S.C. 152 provides in pertinent part:

> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

A four-count indictment returned in the United States District Court for the Southern District of Texas charged petitioner and one Jamail with making, and conspiring to make, a false oath in a bankruptcy proceeding, in violation of 18 U.S.C. 152 and 371 (R. 4–11). Upon waiver of a jury trial (R. 13–14), petitioner was tried by the court and found guilty on the conspiracy count and one substantive count (R. 464, 512). On each of the counts, petitioner was sentenced to imprisonment for 13 months, the terms of imprisonment to run concurrently and to be suspended, conditioned upon good behavior during a probation period of five years and the payment of a

$7500 fine on the conspiracy count (R. 467, 512–513). The court of appeals unanimously affirmed.[1]

The substantive count upon which petitioner was convicted charged that he knowingly testified falsely on November 20, 1958, before a trustee in bankruptcy that neither he personally, nor any business venture with which he was associated, nor his "office overhead," received any of the money paid by the Texas Portland Cement Company ("Texas Portland") to Jamail for services purportedly rendered in handling partial payments on a debt owed by the company (R. 7–8). The conspiracy count charged that, in November and December of 1958, petitioner and Jamail had agreed that, when called in the bankruptcy proceeding, they would testify falsely regarding instances in which petitioner had acted in a manner inconsistent with his duties as director of Texas Portland—particularly with respect to the question whether petitioner had received compensation from the company for handling payments on the debt described in the substantive count (R. 10).

1. THE EVIDENCE AS TO COMPANY TRANSACTIONS

Petitioner, an attorney, shared his office space and his secretarial help with Jamail, an investment broker. In early 1957, petitioner aided Texas Portland in obtaining a $600,000 loan, payable in three yearly installments plus interest (R. 126, 401).

[1] Jamail was convicted of the same offenses, and received a similar sentence (R. 464, 467, 513–515). His conviction was upheld by the court of appeals (Pet. 22), and he has not filed a petition for a writ of certiorari.

The brokerage fee for obtaining the loan was divided between petitioner and Jamail (R. 409).

In July of 1957, petitioner was elected to the Board of Directors of Texas Portland (R. 115). When the first principal installment on the company's loan became due in January of 1958, the company was unable to meet its obligation. The lender, Bishop Nold of the Catholic Church, was persuaded to accept a check for $42,000, representing interest on the loan, and to grant a moratorium to the company under an arrangement whereby its invoices would be pledged to him in the amount of $2,500 per week. The Bishop, who had no bookkeeping facilities to handle such an arrangement, suggested that the collection of his funds be handled through petitioner's office (R. 126–129).

Kent Diehl, the president of Texas Portland, testified that petitioner agreed to collect the Bishop's funds only if the company agreed to pay $10,000 for the services in monthly installments of $833.33. Petitioner said that, because he was a director of the company, it would be better that he not receive the payments personally. The payments were to be made to Jamail (R. 132–134). The matter was discussed in petitioner's office in the presence of Jamail. The agreement between the three men was evidenced by a letter dated March 11, 1958, from Diehl to Jamail reciting that the $10,000 per year was to be paid "to you, not only [for] negotiating the loan but for your service in keeping the records and the payment to the Right Reverend W. J. Nold, in accordanee with our agreement" (R. 473). The records were kept by

petitioner, with his secretary doing the bookkeeping (R. 435–436).

The records of Texas Portland showed that it issued a check for $833.33,[2] dated April 3, 1958, to the order of Jamail, supported by a voucher showing that the check was in "payment for services rendered in connection with accounting and managerial services account of The Most Reverend W. J. Nold" (R. 69, 179, 477). The check was endorsed by Jamail and deposited to Jamail's account on April 3, 1958 (R. 476, 495). On the same day there was deposited in petitioner's bank account a check for $416.66, dated April 2, 1958, signed by Jamail and payable to petitioner, which bore on its face the notation "½ fee from Texas Portland Cement Company for services rendered". The check, identified by bank personnel, was endorsed by typewriter, "For deposit only to account of T. R. Mosheim" (R. 233, 235, 492).

Miss Julia Bradley who acted as secretary for both Jamail and petitioner, testified that she prepared the $416.66 check payable to petitioner upon Jamail's instructions that she was to write a check to petitioner for half of the $833.33 Texas Portland check to Jamail (R. 255–256, 264–265). She did not know whether petitioner saw the check at that time (R. 255–256). She credited the $416.66 on the ledger sheet as income to petitioner (R. 263). During the summer of the

[2] There was also evidence with respect to two other checks described in the indictment showing a complicated transaction by which company invoices, pledged in return for a $1,200 personal loan to petitioner, were redeemed through company checks made payable to Jamail.

same year, petitioner told her that she had credited the sum erroneously and that it should have been posted to Jamail's account on his running debt to petitioner for office expenses (R. 263–264). Petitioner explained to her "I am a director of that company, and I cannot take this money."

The evidence further showed that petitioner, Diehl and Jamail had guaranteed in writing the performance of an obligation of "Delmojam," a corporation which discounted the invoices of Texas Portland and made a profit therefrom (R. 143–150, 191–207, 486–488). Diehl testified that the corporate name was a contraction of the names of the three principals (Diehl, Mosheim and Jamail (R. 138)). A purchaser of due bills of Portland Cement, one Gross, testified that Delmojam agreed to repurchase the bills, that Mosheim had an interest in Delmojam, and that he had handled the entire transaction for Gross (R. 193–195).

2. THE TESTIMONY IN THE BANKRUPTCY PROCEEDINGS

On November 20 and 21, 1958, petitioner and Jamail were called to testify in proceedings for the reorganization of Texas Portland under the Bankruptcy Act.

Petitioner testified that he did not know why certain company checks, including one for $833.33, were paid to Jamail (R. 303). He denied that he ever agreed with Diehl to accept $10,000 per year as compensation for handling the collection of invoices for the Bishop's loan (R. 304–314). He was asked and replied as follows (R. 316):

> Q. I will ask you again, did you personally receive from Mr. Jamail any portion of the

money remitted to him by the Texas Portland Cement Company for his services?

A. No, sir.

Q. Did any business venture that you were associated in, be it corporation, partnership or sole proprietorship receive any portion of the compensation or any portion of the money received by Mr. Jamail for these services?

A. Not that I know of.

Q. Did the office overhead, that is your legal office, did it receive any portion of the money that was paid to Mr. Jamail by the Texas Portland Cement Company?

A. No, sir. The source of his funds used in paying his portion of the expenses, in other words, I don't know where he got the money. I am not passing on that, but as far as anything coming out of those proceeds to me or for my benefit or to any corporation or company in which I have a financial interest, no, sir.

Jamail testified that petitioner "never got a nickel"—"[not] a red cent" out of the payments made to Jamail on the $10,000 agreement. He said Diehl paid him to persuade petitioner to talk to the Bishop about arrangements for paying off the loan (R. 325, 326, 327, 329, 333). He denied that any portion of the money was used for the benefit of anybody else (R. 329).

Both petitioner and Jamail denied that petitioner had any interest in the separate corporation Delmojam (R. 295–298; 335, 337, 343). Both testified that the name was contracted from the words "Deliver

more jam"; both denied that the name was derived from the names Diehl, Mosheim and Jamail (R. 294-295; 336).

3. PETITIONER'S TESTIMONY AT THE TRIAL

Petitioner, taking the stand to deny that he had intentionally made a false oath (R. 407), corroborated in large part the testimony of government witnesses. He admitted that he knew that Jamail was receiving $833.33 a month from the company for work which he himself was doing (R. 425, 430, 435); and that, in June or July of 1958, he told his secretary that he was not entitled to receive the check for $416.66 and that she must therefore correct her records to show that it was received from Jamail for office expenses (R. 396-397). He also testified that he and Jamail had followed a standard arrangement for their joint business ventures whereby profits were split fifty-fifty, including the brokerage obtained for negotiating the loan in the first instance (R. 409, 419), as well as other transactions involving Texas Portland (R. 410, 419-420).

ARGUMENT

1. The principal issue that petitioner raises (Pet. 8-11)—whether the "two witness" rule of proof in perjury cases is applicable to prosecutions for making a false oath in bankruptcy proceedings (see *Hammer* v. *United States*, 271 U.S. 620, 626; *Gold* v. *United States*, 352 U.S. 985, 986)—is not presented in this case. For the court of appeals held (Pet. 20-21) that it was unnecessary to decide that question since "under the strict rule obtaining in perjury cases," "there was ample evidence as against both Mosheim

and Jamail to establish the falsity of the oath and the intent required." See *United States* v. *Marachowsky*, 201 F. 2d 5 (C.A. 7).

Petitioner has never denied (indeed his testimony at trial corroborated) the documentary evidence and the testimony of his secretary that a sum representing one-half of a monthly payment by Texas Portland to Jamail was in fact deposited to his account in April 1958 (R. 396). His argument that the proof was insufficient to show that he swore falsely, in November of the same year, that he had never received such funds, therefore must be that the government did not prove by two witnesses that he was aware of the significance of his receipt and thus of the falsity of his oath. But even in perjury cases the law does not require that subjective elements pertaining to the state of a man's mind—such as intent, knowledge, belief or recollection—be proved by direct testimony. Such matters must of necessity be established by circumstantial evidence, i.e., inferred from evidence as to what the defendant did or said. See the Government's Brief in Opposition, *Magin* v. *United States*, No. 411, this Term, certiorari denied, 364 U.S. 914. See also *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2), certiorari denied, 342 U.S. 895.

In any event, petitioner's knowledge of the falsity of his oath was shown by the testimony of three witnesses, including petitioner himself. Thus, the court could conclude from the testimony of the company president (that petitioner arranged for the payments

to be made to Jamail because he believed that payments to him [the petitioner] would be improper conduct by a corporate director), that petitioner was not only aware of the source of the funds but expected to receive some of the money. Further, there was petitioner's own admission, corroborating the testimony of his secretary, that when he discovered in the summer of 1958 that money from this source had been deposited to his account, he instructed, not that the money be returned, but that the records be changed to reflect that the money was received as a payment on office expenses. This was direct proof that petitioner testified falsely when he denied that his "office overhead" or "legal office" had received money known by him to be a part of company funds compensating Jamail.[3]

2. There is no merit in petitioner's contention that he was improperly charged and convicted with Jamail under the conspiracy count. An agreement to testify falsely at a bankruptcy proceeding represents a serious obstruction to the proper conduct of such proceedings; the substantive provisions of 18 U.S.C. 152 were designed to prevent such obstructions. The evidence fully justified the trial court in concluding that these two men had agreed that their testimony before the trustee would coincide to the point of making identical false statements regarding their business ventures.

[3] Pressed at trial about his knowledge of the source of the funds, petitioner admitted (R. 455):

"Yes, I had known. I wasn't thinking about it at the moment; they weren't in my mind at that particular time. Why I answered it that way, I am going to be honest with you, Judge, I don't know. I just don't know."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1961.

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